STATE OF MICHIGAN

COURT OF APPEALS

GARTH BOSWELL,

Plaintiff-Appellant,

v

BRIDGEWATER INTERIORS, L.L.C., and DIAHANN FRISBY,

Defendants-Appellees.

UNPUBLISHED
November 22, 2011

No. 297175
Macomb Circuit Court
LC No. 2009-000389-NZ

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this wrongful discharge case, plaintiff appeals as of right an order granting summary disposition in favor of defendants. Because plaintiff failed to successfully allege or factually support his claim that defendants violated the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, the trial court properly granted defendants' motion under MCR 2.116(C)(8) and (C)(10). Further, plaintiff has waived the bulk of his issues on appeal. Accordingly, we affirm.

Plaintiff was suspended and later discharged from his at-will position as a quality engineer at the Warren plant of defendant, Bridgewater Interiors, L.L.C., after a female line worker accused him of sexual harassment. Defendants investigated the worker's complaint and discharged plaintiff for violating an internal sexual harassment policy and for failing to leave the plant grounds, as instructed, on the day of his suspension. Plaintiff sued, alleging in a four-count complaint that defendants violated the ELCRA, that defendants violated the Bullard-Plawecki Employee Right to Know Act (BPERKA), MCL 423.501 *et seq.*, that defendants intentionally inflicted emotional distress through their treatment of plaintiff (plaintiff's "IIED" claim), and that plaintiff was entitled to exemplary damages as a result of defendants' willful, wanton, and reckless disregard for his rights. Plaintiff later withdrew the BPERKA claim. Further, he presented no arguments or authority in support of his IIED and exemplary damages claims in response to defendants' motion for summary disposition and presents no such arguments before this Court. Accordingly, plaintiff failed to preserve any arguments with regard to these claims, *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149; 792 NW2d 749 (2010) (to preserve an issue for appeal, a party must specifically raise it before the trial court), and he has waived these claims on appeal, *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000) (a party waives an issue for purposes of appeal if he or she fails to include the issue in the statement of questions presented and to cite authority in support of the position).

Appellate courts review de novo a trial court's decision whether to grant a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint based on the pleadings alone. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). Such a motion "should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). A motion under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 263-264; 715 NW2d 914 (2006). The moving party "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and "must support its position with affidavits, depositions, admissions, or other documentary evidence," *St Clair Medical*, 270 Mich App at 264; MCR 2.116(G)(5). Once the moving party has done so, "the burden shifts to the opposing party to show that a genuine issue of material fact exists" by offering documentary evidence "set[ting] forth specific facts to show that there is a genuine issue for trial." *St Clair Medical*, 270 Mich App at 264. The pleadings and other evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Brown*, 478 Mich at 551-552.

With regard to plaintiff's only remaining claim, which is the ELCRA count, MCL 37.2202 provides in pertinent part:

> (1) An employer shall not do any of the following:
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> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

In some discrimination cases, a plaintiff may be able to produce direct evidence of bias relative to the protected characteristic, and in those cases, the "plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Direct evidence consists of evidence that, if believed, requires a conclusion that unlawful discrimination was at least in part a motivating factor for the adverse employment action. *Id.* Here, no direct evidence of discrimination was alleged, nor has it been shown through documentary evidence. Often, there is no direct evidence of impermissible bias, and in those cases a plaintiff may proceed under the steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle*, 464 Mich at 462. The *McDonnell Douglas* approach, which has been adopted for purposes of race, age, and gender discrimination cases, permits a plaintiff to present a rebuttable prima facie case based on proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. *Id.* at 462-463. To state a prima facie case of discrimination under the ELCRA, an employee must "show that the employee was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected

by the employer's adverse conduct." *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).[1]

If a plaintiff has sufficiently established a prima facie case, there arises a presumption of discrimination under the *McDonnell Douglas* test. *Hazle*, 464 Mich at 463. The defendant employer then has the opportunity to articulate a legitimate, nondiscriminatory reason for its adverse employment decision in an effort to rebut the presumption. *Id.* at 464. If the defendant employer successfully does so, the presumption drops away, and, at that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case was sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse employment action. *Id.* at 465.

Plaintiff chiefly argues that he was treated unfairly during defendants' internal investigation of the line worker's claim that plaintiff violated defendants' internal, corporate no-harassment policy. Although he suggests that the ELCRA afforded him particular rights with regard to such an investigation – apparently a right to general fairness or balance during the investigative process – he provides no authority to support such a proposition. Rather, as defendants aptly note, this Court stated in *Matras v Amoco Oil Co*, 424 Mich 675, 686; 385 NW2d 586 (1986), that the ELCRA "does not provide a remedy for unfair treatment unless it was because of [unlawful] discrimination" against the plaintiff. The facts of *Matras* are comparable. There, the plaintiff alleged that a performance evaluation process was designed to discriminate against employees on the basis of age. This Court concluded that, "[a]lthough the evaluations might not fairly reflect [the plaintiff's] performance, . . . there is insufficient evidence to conclude that the low evaluations were a product of age discrimination." *Id.* at 685-686. Here, similarly, plaintiff complains that the investigative process was unfair or somehow biased against him. For example, he asserts that defendants focused on witnesses who supported the accusing worker's version of events, refused to interview witnesses suggested by plaintiff, and disadvantaged him by barring him from the plant during the investigation. But, as in *Matras*, regardless of whether plaintiff's assertions would support a claim of general unfairness, such assertions, in and of themselves, do not support a claim of unlawful discrimination on the basis of plaintiff's membership in a protected class. As this Court similarly observed in *Meagher v Wayne State Univ*, 222 Mich App 700, 712; 565 NW2d 401 (1997), "unfairness will not afford a plaintiff a remedy unless the unfair treatment was *because of* [unlawful] discrimination." (Emphasis added.)

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[1] In *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998), the Court described another prima facie test as encompassing a different fourth element which necessitated a showing that the plaintiff "was discharged under circumstances that gave rise to an inference of unlawful discrimination." See also *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538 n 8; 620 NW2d 836 (2001).

Accordingly, plaintiff's complaint of general unfairness during the investigative process clearly failed to state a claim under the ELCRA. Further, for this reason, the potential factual disputes in the record to which plaintiff points are immaterial and thus irrelevant to the outcome of defendants' motion or this appeal. What actually occurred between plaintiff and the female worker—or, for example, whether, when plaintiff remained on the grounds after his suspension, he drove around to taunt the worker or, instead, he simply made business calls, as he claimed—only reflects on whether defendants fairly investigated the underlying facts and later fairly discharged plaintiff according to internal policies, as a general matter. A successful claim that plaintiff was discharged in violation of the ELCRA was not merely dependent on whether he, in fact, sexually harassed the worker or whether the discharge process was balanced as applied to the accuser and to the accused. As observed by our Supreme Court in *Town*, 455 Mich at 704, the "'plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.'" (Citation omitted.) For these reasons, the trial judge properly concluded:

> I am not persuaded that the conduct that the Plaintiff complains about in this case amounts to a violation of the [ELCRA]. . . . It's not clear to me at all that there is any evidence that the [plaintiff] was a member of a protected class and that he was treated differently than someone else who is similarly situated, but outside his protected class, which then led to the . . . adverse employment action . . . .
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> What the allegations in this case amount to is a general claim of unfairness in the way that the investigation was conducted. And again, the Court takes no position on that. I'm not here to supervise the HR department of this corporation and to second-guess their decisions. I'm only here to make sure they're not done in a manner that's contrary to the civil rights laws.
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> The case again sounds more like a just cause employment dispute, with the [plaintiff] saying there was not cause for his termination. But of course as counsel has conceded, he was an at will employee and does not have those rights.

Plaintiff's only chance of success under the ELCRA was his barely asserted implication that he was discriminated against on the basis of his sex,[2] which is a protected class under the ELCRA, MCL 37.2202(1)(a), because he, a *male*, was suspended and otherwise disadvantaged

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[2] In the trial court, the entire extent of plaintiff's argument with regard to gender discrimination consisted of the following statements by his attorney at the motion hearing: "we're going to make the gender claim because [the female worker] was treated differently at the time – "; "[t]he accuser was not taken off the job, [plaintiff] was. She had full rights on the job." The court interjected: "So your claim is that your client was discriminated against based on his gender?" The attorney responded: "That was initial, yes, partially, because she had greater rights than he did. He was taken off the job – ."

during the investigation of the worker's complaint against him, yet the *female* worker remained on the job site and was allowed to provide more information or witnesses to the Human Resources Department. However, plaintiff has failed to allege or support a prima facie case of discrimination in this regard. Indeed, on appeal, plaintiff does not advance this argument or provide any authority to support it. Accordingly, he has waived the argument. *Caldwell*, 240 Mich App at 132-133 (A party waives an issue for purposes of appeal if he or she fails to include the issue in the statement of questions presented and to cite authority in support of the position; "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim"). In any event, as defendants argue, plaintiff failed to allege or produce facts in support of this argument. Again, he has provided no evidence that any adverse actions were taken against him—or that defendants generally treated him unfairly—*because of* his sex or gender.

A plaintiff may provide direct or circumstantial evidence from which a finder of fact could conclude that the employer was motivated by discriminatory animus. *Town*, 455 Mich at 697. As defendants point out, plaintiff's own deposition testimony refutes any claim that defendants or their employees exhibited bias against him *because* he is a man. Plaintiff attested that his friction with the workers and line supervisors had nothing to do with his gender, that the lawsuit had to do with his "civil rights [being] violated" due to the unfair investigation but "gender had nothing to do with [it]," and that he "d[id]n't believe" the investigation had "anything to do" with his gender. At most, plaintiff appears to infer bias from the mere fact that he was suspended pending the investigation whereas the complaining female worker was not. But this argument fails to satisfy the fourth necessary element of a prima facie discrimination claim; plaintiff has not shown that a similarly situated person outside his protected class was treated differently. As defendants argue, the apparent victim of harassment, a line worker, was not similarly situated to plaintiff, who had indirect authority over the worker and who was the alleged perpetrator of harassment that not only violated defendants' internal policy but, as defendants assert, could subject defendants to liability under the ELCRA for the acts of plaintiff as their employee. Plaintiff does not argue that the worker perpetrated similar harassment, nor does he argue that any woman accused of similar harassment remained on the job during an investigation of her victim's claims. Indeed, Human Resources Supervisor Lillie Rucker attested that suspension pending investigation of an employee accused of sexual harassment was common practice at the company.

In sum, plaintiff's ELCRA claim fails substantively even when the facts are viewed in the light most favorable to him and, indeed, even when his waived arguments are elaborated for him by defendants. Accordingly, the trial court properly granted defendants' motion for summary disposition under MCR 2.116(C)(8) and (C)(10).

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause